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266 NLRB No. 19

D--9682
San Jose, CA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MELLO PETROLEUM MAINTENANCE
& CONSTRUCTION CO., INC.

and

Case 32--CA--4500

SALES DELIVERY DRIVERS,
WAREHOUSEMEN AND HELPERS UNION,
LOCAL 296, AN AFFILIATE OF THE
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS
OF AMERICA

DECISION AND ORDER

Upon a charge filed on May 14, 1982, by Sales Delivery Drivers, Warehousemen and Helpers Union, Local 296, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on Mello Petroleum Maintenance & Construction Co., Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 32, issued a complaint on July 15, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the

charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that Respondent has failed to continue in full force and effect the terms and conditions of employment of the unit employees as set forth in the collective-bargaining agreement by refusing the Union's written requests of March 17, 1982, and April 13, 1982, to suspend from employment employee Bert R. Pfiffer because of his failure to fulfill his obligations pursuant to the union-security clause. The complaint alleges that by this conduct Respondent has failed and refused, and is failing and refusing, to bargain collectively and in good faith with the representative of its employees, and has thereby been engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) and Section 8(d) of the Act. Respondent failed to file an answer to the complaint.

On September 23, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on September 27, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter did not file a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations

charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

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On September 23, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on September 27, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter did not file a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations

Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the Respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaint and notice of hearing served on Respondent herein specifically states that unless an answer to the complaint is filed within 10 days of service thereof ''all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.'' Further, according to the uncontroverted allegations of the Motion for Summary Judgment, Respondent was duly served with the complaint and notice of hearing on July 19, 1982.[1] On July 30, Respondent requested a postponement of the hearing date but did not file an answer. In response, according to the uncontroverted allegations of the Motion for Summary Judgment, counsel for the General

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[1] All dates are in 1982, unless otherwise noted.

Counsel telephoned Respondent's office on August 6 and 9 and left messages with Respondent's office manager, Joyce Ferrante, informing Respondent that its answer was due, and that Respondent should contact the Regional Office, if necessary, to request an extension of time to file an answer. Respondent did not respond to the telephone messages. Counsel for the General Counsel also wrote to Respondent on August 9 and informed it that the hearing date could not be postponed without further information as to why such a postponement would be necessary. The letter also informed Respondent that the deadline for receipt of the answer to the complaint had been extended to August 18, and that no further extensions of time would be granted. It also informed Respondent that if an answer were not filed by August 18, all allegations in the complaint would be deemed true pursuant to Section 102.20 and 102.21 of the Board's Rules and Regulations. Respondent thereafter failed to file an answer.

Accordingly, in light of the rules set forth above, no good cause having been shown for the failure to file a timely answer, the allegations of the complaint are deemed admitted and are found to be true, and we grant the General Counsel's Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent is, and has been at all times material herein, a California corporation with an office and place of business in

San Jose, California, and has been engaged in the business of installation and maintenance of fuel storage tanks and related equipment. During the 12 months preceding issuance of the complaint, which is a representative period, Respondent, in the course of its business operations, purchased and received goods valued in excess of $50,000 from sellers or suppliers located within the State of California, which sellers or suppliers received such goods in substantially the same form directly from outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Sales Delivery Drivers, Warehousemen and Helpers Union, Local 296, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practice

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time plumbers, maintenance and construction workers employed by the Employer at its San Jose facility, excluding all office clerical employees, guards and supervisors as defined in the Act.

At all times material herein, the Charging Party has been, and is now, the exclusive representative of Respondent's

employees for purposes of collective bargaining. Respondent and the Charging Party have entered into a series of successive collective-bargaining agreements, the most recent of which was effective by its terms from January 1, 1980, to December 31, 1982. Among other provisions, the agreement contained a union-security clause requiring membership in good standing in the Union after a specified period of time as a condition of employment.

The agreement provided that upon written notice from the Union of failure on the part of any individual to complete membership in the Union as required under the agreement, or written notice of failure by an individual to continue payment of dues, ''the Employer shall within seven (7) days of such notice, discharge said employee.''

On March 17 and April 13, the Charging Party submitted to Respondent a written request that Respondent suspend from employment employee Bert R. Pfiffer because of his failure to fulfill his obligations pursuant to the union-security clause. Respondent failed and refused to honor the written request. This failure and refusal to carry out the union-security clause is a modication of the agreement under Section 8(d) of the Act. Respondent, in modifying the contract, did not comply with the notice requirements of Section 8(d). Accordingly, we find that by failing to comply with the notice requirements of Section 8(d) of the Act, Respondent did refuse and is refusing to bargain collectively with the exclusive representative of its employees, and thereby did engage in and is engaging in an unfair labor

practice within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

Conclusions of Law

1. Mello Petroleum Maintenance Construction Co., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Sales Delivery Drivers, Warehousemen and Helpers Union, Local 296, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time plumbers, maintenance and construction workers employed by the Employer at its San Jose, California facility; excluding all office clerical employees, guards and supervisors as defined by the Act,

constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By failing and refusing to act on the Union's requests on March 17 and April 13, as provided for in the collective-bargaining agreement, Respondent unilaterally modified the agreement without complying with Section 8(d), and Respondent has refused to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate bargaining unit described above and thereby has engaged in and is engaging in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Mello Petroleum Maintenance & Construction Co., Inc., San Jose, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Sales Delivery Drivers, Warehousemen and Helpers Union, Local 296, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of the employees in the unit described above, by unilaterally modifying a provision of the collective-bargaining agreement without compliance with the notice requirements specified in Section 8(d) of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at its San Jose, California, facility copies of the attached notice marked ''Appendix.''[2] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily

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[2] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. February 2, 1983

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

Robert P. Hunter, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Sales Delivery Drivers, Warehousemen and Helpers Union, Local 296, an affiliate of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of the employees in the bargaining unit described below, by unilaterally, and without the consent of the Union, repudiating, modifying, or terminating during its effective term a provision of the collective-bargaining agreement entered into by us and the representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

The appropriate bargaining unit is:

All full-time and regular part-time plumbers, maintenance and construction workers employed by the Employer at its San Jose, California, facility; excluding all office clerical employees, guards and supervisors as defined by the Act.

MELLO PETROLEUM MAINTENANCE & CONSTRUCTION CO., INC.

(Employer)

Dated ---------- By ----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Breuner Building, 2d Floor, 2201 Broadway, P.O. Box 12983, Oakland, California 94604, Telephone 415--273--6122.